

NOV 16 2000

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Federal Communications Commission  
Washington, D.C. 20554

In the Matter of )  
 )  
Communications Assistance for Law ) CC Docket No. 97-213  
Enforcement Act )

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COMMENTS  
OF THE  
UNITED STATES TELECOM ASSOCIATION

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November 16, 2000

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## SUMMARY

Just as the U.S. Court of Appeals found that the four punchlist capabilities were not consistent with the definition of call identifying information contained in the J-Standard, the Commission must also recognize that the four punchlist capabilities are not call identifying information. There is overwhelming evidence already before the Commission explaining that these capabilities are not call identifying information. According to the statute, call identifying information consists of the numbers dialed or transmitted for the purpose of routing a call. None of the disputed punchlist capabilities fit this definition. The record confirms that the definition of call identifying information used in the J-Standard is consistent with the statutory language and the legislative history confirms that the definition reflects Congressional intent. As the Court noted, since the Commission did not find that the definition was deficient, it could not alter the definition by including punchlist capabilities that were clearly inconsistent with the definition.

The record strongly supports the fact that the J-Standard is not deficient. In fact, the J-Standard represents the best means to achieve the statutory requirements that CALEA be implemented in a cost effective manner so as to minimize the impact on residential ratepayers and in an unobtrusive manner so as to minimize interference with any customer's telecommunications service and to protect a customer's privacy. The record demonstrates, and the Court agreed, that the punchlist capabilities are not cost effective and will not protect the privacy and security of information not authorized to be intercepted. The J-Standard provides law enforcement with access to the information it seeks with the punchlist capabilities. Thus, the J-Standard provides reasonable alternatives that comply with the statutory limitations.

As the Court explained, CALEA requires the Commission to give deference to the industry standard. This requirement appropriately leaves technical decisions in the hands of

industry experts. The Commission can *only* modify the standard if five criteria are met. The record is clear that the four punchlist capabilities do not satisfy the five criteria. The Commission cannot require that the J-Standard include the four punchlist capabilities.

Finally, USTA again urges the Commission to suspend the September 30, 2001 punchlist compliance date, as it is already too late for carriers to make the necessary budget determinations and to install and test the punchlist capabilities.

Before the  
**Federal Communications Commission**  
Washington, D.C. 20554

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**COMMENTS  
OF THE  
UNITED STATES TELECOM ASSOCIATION**

The United States Telecom Association (USTA) respectfully submits its comments in the above-referenced proceeding. USTA is the nation's oldest trade association for the local exchange carrier (LEC) industry. USTA represents more than 1,200 telecommunications companies worldwide that provide a full array of voice, data and video services over wireline and wireless networks. Its members are subject to the requirements of the Communications Assistance for Law Enforcement Act (CALEA).

**I. INTRODUCTION AND SUMMARY.**

In a Public Notice released October 17, 2000, the Commission is seeking comment on issues related to the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *USTA v. FCC*, No. 99-1442 (D.C.Cir. Aug. 15, 2000). In that case, the Court vacated a portion of the Commission's *Third Report and Order* in CC Docket No. 97-213 requiring carriers to provide four "punch list" capabilities requested by the Department of Justice/Federal Bureau of Investigation [law enforcement].<sup>1</sup> The Court of Appeals found that the Commission had exceeded its statutory authority, impermissibly expanded the definition of "call identifying information" and violated CALEA's requirements that the Commission ensure that the statute is

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<sup>1</sup>Communications Assistance for Law Enforcement Act, *Third Report and Order*, 14 FCC Rcd 16794 (rel. Aug. 31, 1999). The punchlist items at issue in the case are: post cut-through dialed digit extraction, party hold/join/drop

implemented in a cost effective manner, minimizing the impact on residential ratepayers and protecting the privacy and security of communications not authorized to be intercepted.

The Court determined that the Commission's decision to include the four punchlist capabilities in the industry-developed and approved J-STD-025 [J-Standard] reflected a lack of reasoned decision-making. The Court observed that the Commission failed to explain how each of the punchlist capabilities provided call identifying information as defined in the J-Standard. Because the Commission never concluded that the definition was deficient, the Court found that the Commission could not alter the definition by including capabilities that were inconsistent with the definition. In addition, the Court found that the Commission failed to consider how the punchlist capabilities would impact residential telephone rates. The Court was concerned that the estimated costs of implementing CALEA were significant and, yet the Commission had not considered whether the punchlist capabilities were cost effective or whether more cost effective alternatives existed. Finally, the Court found that the Commission failed to consider whether the security and privacy of communications not authorized to be intercepted was protected with regard to post-cut-through dialed digit extraction.

The Commission now seeks comment on the issues raised by the Court. Specifically, the Commission seeks comment on the definition of the term call identifying information and on whether the four punchlist capabilities are covered by that term. As will be discussed in these comments, there is an extensive record already before the Commission providing overwhelming evidence that the four punchlist capabilities are not included in the term call identifying information. The record confirms that the J-Standard is not deficient, but, in fact, meets the requirements of the statute. Because the Commission is required to give deference to the

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information, subject-initiated dialing and signaling information, and in-band and out-of-band signaling. These will be discussed below.

industry standard, the Commission must heed the ruling of the Court and eliminate the four punchlist capabilities.

**II. THE DEFINITION OF CALL IDENTIFYING INFORMATION IN THE J-STANDARD IS NOT DEFICIENT AND CANNOT BE ALTERED BY INCLUDING THE PUNCHLIST CAPABILITIES.**

CALEA authorizes industry standards-setting bodies to formulate technical requirements for compliance. A carrier is deemed to be in compliance with CALEA if it adheres to an industry standard. 47 U.S.C. § 1006(a). Law enforcement's role is limited to consultation with appropriate associations and standards-setting organizations. It may not require or prohibit any specific design of equipment, facilities, services, features or system configurations. 47 U.S.C. §§ 1002(b), 1006(a).

CALEA empowers the Commission to modify an industry standard on petition by an Agency or person claiming that the industry standard is deficient. The Commission may add or modify the standard *only* if the new requirement: 1). Meets the statutory capability requirements by cost effective methods, 2). Protects the privacy and security of communications not authorized to be intercepted, 3). Minimizes the costs of such compliance on residential ratepayers, 4). Encourages the provision of new technologies and services and 5). Provides reasonable time and conditions for compliance. 47 U.S.C. § 1006(b). According to the statutory scheme, the industry has the authority to develop the technical standards to meet the capability requirements. This appropriately leaves technical decisions in the hands of industry experts. The technical standards that they develop cannot be overturned unless the Commission finds that the technical standards are deficient and do not meet the statutory requirements. In order for the Commission to substitute a new requirement in lieu of the experts' standards, the Commission must find that the new requirement meets all five criteria. As was pointed out repeatedly in the

record before the Commission, the definition of call identifying information was not deficient and the above criteria were not met in regard to the challenged punchlist capabilities. Thus, the Commission cannot require that the J-Standard include the four punchlist capabilities.

The Court noted that while it is well established that the Commission must cogently explain why it has exercised its discretion in a given manner, the Commission's determination that CALEA requires carriers to implement the four punch list capabilities failed to meet that test. "The Commission *asserted* that each of the challenged punch list capabilities is required by CALEA because each requires carriers to make available 'call identifying information,' but it never explained—not in the Order and not in its brief—the basis for this conclusion. Nowhere in the record did the Commission explain how the key statutory terms—origin, direction, destination, and termination—can cover the wide variety of information required by the punch list." *USTA v. FCC*, Slip Op. at 15.

The Court found this failure on the part of the Commission especially troubling given the fact that the statute requires the Commission to give deference to the industry standard.

The Commission's failure to explain its reasoning is particularly serious in view of CALEA's unique structure. Rather than simply delegating power to implement the Act to the Commission, Congress gave the telecommunications industry the first crack at developing standards, authorizing the Commission to alter those standards only if it found them 'deficient.' 47 U.S.C. § 1006(b). Although the Commission used its rulemaking power to alter the J-Standard, it identified no deficiencies in the Standard's definitions of the terms 'origin,' 'destination,' 'direction,' and 'termination,' which describe 'call identifying information' in terms of telephone numbers. Were we to allow the Commission to modify the J-Standard without first identifying its deficiencies, we would weaken the major role Congress obviously expected industry to play in formulating standards. *USTA v. FCC*, Slip op. at 16.

Simply stated, the Commission's failure to articulate a rationale for including the punchlist capabilities reflects the fact that the extensive record in this proceeding, developed over five years, does not support the Commission's decision. The definition of call identifying

information contained in the J-Standard implements the wording of the statute, consistent with the intent of Congress. It further represents a consensus of industry and law enforcement experts who, in a fair and open process, considered the concerns and opinions of industry engineers, law enforcement officials and privacy interests to balance competing and conflicting positions. The definition is not deficient and there is no basis for the Commission to once again ignore the record before it and attempt to reinsert the punchlist capabilities into the standard.

CALEA requires carriers to ensure that their equipment, facilities, or services that provide a customer with the ability to originate, terminate, or direct communications are capable of expeditiously isolating and enabling the government, pursuant to a court order or other lawful authorization, to access call identifying information that is reasonably available to the carrier. 47 U.S.C. § 1002(a). The statute also requires carriers to deliver intercepted communications and call identifying information to the government and to facilitate authorized communications interceptions and access to call identifying information unobtrusively, with a minimum of interference with any customer's service and in a manner that protects the privacy and security of communications and call identifying information not authorized to be intercepted. 47 U.S.C. § 1002(a). Congress defined call identifying information as "dialing or signaling information that identifies the origin, direction, destination, or termination of each communication generated or received by a subscriber by means of any equipment, facility, or service of a telecommunications carrier." 47 U.S.C. §1001(2).

During the development of the J-Standard, the industry representatives researched the legislative history regarding the exact nature of call identifying information intended by Congress.<sup>2</sup> The House Report defined call identifying information as follows:

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<sup>2</sup> *Ex Parte* Letter from Ben G. Almond, Vice President – Federal Regulatory, BellSouth, to Magalie Roman Salas, Secretary, Federal Communications Commission. CC Docket No. 97-213, May 19, 1999 at Attachment.

the electronic pulses, audio tones, or signaling messages that identify the numbers dialed or otherwise transmitted for the purpose of routing calls through the telecommunications carrier's network. In pen register investigations, these pulses, tones or messages identify the numbers dialed from the facility that is the subject of the court order or other lawful authorization. In trap and trace investigations, these are the incoming pulses, tones or messages which identify the originating number of the facility from which the call was placed and which are captured when directed to the facility that is the subject of the court order or authorization. H.R. Rep. No. 103-827.

The industry standards-setting body designed the J-Standard consistent with the statutory definition as explained in the House Report. Thus, the J-Standard defined call identifying information to include the directory number of the originator of a call, directory numbers dialed by the subject, directory number translations performed by the network, (e.g., an 800 number being translated to a destination directory number or a call being forwarded), and the directory number of the party ultimately answering a call.<sup>3</sup> The key terms, origin, direction, destination and termination, were defined by the industry experts as follows: destination is the number of the party to which a call is being made (e.g., called party); direction is the number to which a call is re-directed or the number from which it came, either incoming or outgoing (e.g., redirected to party or redirected from party); origin is the number of the party initiating a call (e.g., calling party); and termination is the number of the party ultimately receiving a call (e.g., answering party). Consistent with the statute and the legislative history, call identifying information consists of the numbers dialed or transmitted for the purpose of routing a call.

Each capability, including each punchlist capability, was carefully considered, and a decision as to its inclusion in or omission from the J-Standard was made based on the above definitions of the key terms underlying the definition of call identifying information.<sup>4</sup> The Commission, without sufficient explanation, expanded these definitions to include a variety of

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

other types of information which go far beyond the legislative intent. The Commission must defer to the experts as to the meaning of these terms and refrain from altering their meaning in order to adopt the four additional punchlist capabilities. As will be discussed below, the four punchlist capabilities cannot be considered call identifying information. However, as will also be discussed below, the J-Standard does provide a cost-effective alternative to permit law enforcement to obtain the particular information it seeks.

**A. Party Join/Hold/Drop Information**

The standards experts did not include this punchlist capability because it does not constitute call identifying information based on the above criteria. Information about whom a subscriber puts on hold does not identify the numbers dialed or otherwise transmitted for the purpose of routing calls. House Rep. at 21. Once a conference call is established, the origin, direction, destination and termination of that call are fixed. Putting a party on hold and then adding her back to the call does not require dialing any additional number or altering any of those attributes of the call. However, this determination did not render the J-Standard deficient, as it provides access to this information. The inclusion of the punchlist capability would not be cost effective.

In most cases, it will be apparent to law enforcement which parties are participating on a call based on the phone number for each participant, which is already provided for in the J-Standard.<sup>5</sup> An origination message informs law enforcement that the subject has placed an outgoing call and identifies the destination directory number. A termination message informs law enforcement that the subject has an incoming call and identifies the directory number. An answer message identifies the directory number where the call is answered in cases when it is not the normal destination (e.g. call pickup or call forwarding). A change message reports any

changes in call identities. Thus, the J-Standard provides alternative means to provide law enforcement with information that is consistent with the statutory language and is consistent with the extent of information law enforcement was able to obtain prior to the enactment of CALEA. The addition of this punchlist capability in the J-Standard would not be cost effective.

**B. Subject-Initiated Dialing and Signaling Information**

Subject-initiated dialing and signaling information is not call identifying information based on the criteria used by the industry experts and was correctly omitted from the statute. If a subscriber switches from one call to another using call-waiting, there are two calls in progress, both of which are identified by the J-Standard as described below. Switching back and forth does not constitute the termination of the first call. A subject's activation of call forwarding, which occurs before any call has actually been forwarded, does not identify the origin, direction, destination or termination of a communication because no communication has taken place. The J-Standard does provide law enforcement with information regarding subject-initiated activity and is not deficient. The addition of this punchlist capability would not be cost effective.

For example, if the subject is on a call, subscribes to three way calling, presses the switch-hook and dials a directory number, a message will report to law enforcement that a new call has been originated using the origination message.<sup>6</sup> This approach was determined by the industry experts to reduce redundancy, thus avoiding unnecessary costs, by reducing the number of messages that would be generated on the Call Data Channel. Again, the J-Standard already includes a cost effective alternative and is, therefore, not deficient.

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

### **C. In-Band and Out-of-Band Network Signaling**

In-band and out-of-band signals have nothing to do with the numbers dialed and are not used to process or route calls. In most instances, they do not even constitute communications. Rather, they are associated with call attempts that do not result in a communication. A busy signal does not identify the termination or a communication because no communication has occurred. Therefore, this punchlist capability was correctly omitted from the J-Standard.

However, the J-Standard is not deficient with regard to this information. In-band and out-of-band network signaling information is already provided with the J-Standard capabilities. The addition of the punchlist capability would not be cost effective. The J-Standard provides for a termination message to be delivered to law enforcement whenever a call is incoming to a subject. Included in the message is the directory number of the calling party, if it is available to the network. When a termination message is received and the subject is not on a call, it is apparent that the subject's telephone is ringing and that the calling party is listening to audible ringback. Similarly, when a termination message is received for a subject who is on a call and subscribes to call waiting, it is apparent that the subject is hearing a call waiting tone. These network-generated tones are already available on the network and are obvious to law enforcement. There is simply no need to develop a feature to duplicate this capability.<sup>7</sup> Such a result would not be cost effective.

### **D. Post Cut-Through Dialed Digit Extraction**

Any digits dialed after a call has been completed, whether those digits constitute an account number, voicemail password or another telephone number are not call identifying information. Such digits are not part of call processing. As explained in the House Report, call

identifying information consists of “the numbers dialed or otherwise transmitted for the purpose of routing calls through the telecommunications carrier’s network,” not through the network of another carrier. House Rep. at 21. Once, the network has processed the original call, additional digits dialed are not call identifying information. The originating network does not redirect the call, change its destination or alter the point of termination. Such digits, however, if used by another network for call processing, (e.g. an interexchange carrier) will be available to law enforcement from that network. Thus, an alternative means to access this information is available to law enforcement.

The inclusion of post cut-through dialed digits in the J-Standard would be extremely onerous for carriers because it would require carriers to subvert normal call processing needs and buy additional equipment solely to accommodate surveillance activities. Such a result would not be cost effective. In the words of the statute, post cut-through dialed digits are not *reasonably available* from the originating carrier. During normal call processing, touch tone digits are detected by a Touch Tone Register that is available to any line that goes off hook and is associated with that line only so long as it takes the customer to enter the directory number. Thus, the touch tone register is only associated with a call for a short duration when dialing occurs and then is available for use by another call. To make this shared resource available to monitor a call throughout its duration in order to detect post cut-through dialed digits, would negatively impact the level of service for other customers served by the same office by increasing the time it takes to hear a dial tone. This would violate the statutory language of CALEA that requires carriers to facilitate authorized interceptions and access to call identifying information unobtrusively and with a minimum of interference with any subscriber’s

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<sup>7</sup> *Id.* Tones or indications generated in a different switch from the one serving the subject are also currently available. However, a capability would have to be added at the local serving switch to detect tones or indications

telecommunications service. 47 U.S.C. §1002 (a). Carriers cannot be forced to deploy additional touch-tone registers in all switches just to accommodate law enforcement surveillance activities as this is prohibited under CALEA. Law enforcement is not permitted to require any specific design of equipment, facilities, services, features or system configurations to be adopted by any service provider or manufacturer. 47 U.S.C. §1002 (b). The J-Standard provides for law enforcement to use a Call Content Channel to monitor the transmit path from a subject and to extract any post dialed digits. This removes what would be an uneconomic requirement to deploy additional touch-tone registers in every switch.

**E. The Statute Specifically Limits the Assistance Capability Requirements Consistent With Congress' Insistence that the Requirements be Narrowly Interpreted.**

Congress was concerned that CALEA carefully balance the interests of industry, law enforcement and consumers. CALEA was enacted to “preserve the government’s ability... to intercept communications involving advanced technologies such as digital or wireless transmission”. H.R. Rep. No. 103-827 at 9. CALEA was not enacted to expand law enforcement authority. Thus, CALEA specifically limits the assistance capability requirements. As mentioned above, carriers are only required to provide access to call identifying information that is *reasonably available* to the carrier. 47 U.S.C. §1002(a)(2). Carriers must facilitate authorized communications interceptions and access to call identifying information *unobtrusively and with a minimum of interference with any subscriber’s telecommunications service and in a manner that protects the privacy and security of communications and call identifying information not authorized to be intercepted.* 47 U.S.C. §1002 (a)(4). CALEA does *not* authorize law enforcement to require any specific design or equipment, facilities, services, features or system configurations to be adopted by any service provider or manufacturer or to

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that could be returned over a connection to a remote switch. This would place a heavy burden on network providers.

prohibit the adoption of any equipment, facility, service or feature by any service provider or any manufacturer. 47 U.S.C. §1002(b). To preserve the balance it intended, Congress insisted that industry, law enforcement and the Commission narrowly interpret CALEA's requirements. House Rep. at 22-23. These statutory limitations were also considered during the deliberations of the standards body in its development of the J-Standard.

The record before the Commission is clear and compels only one result. The J-Standard reflects the legislative intent as to the definition of call identifying information as well as the key terms that comprise that definition. The record does not provide the necessary justification to include the punchlist items within the capability requirements.

### **III. COST EFFECTIVE IMPLEMENTATION OF CALEA AND PROTECTION OF CUSTOMER PRIVACY CAN BEST BE ACHIEVED THROUGH THE J-STANDARD ADOPTED BY INDUSTRY.**

The Court also found that the Commission's decision did not reflect CALEA's requirement that the Commission's rules must meet the assistance capability requirements of Section 1002 by cost effective methods and minimize the cost of compliance on residential ratepayers. The Commission never explained how the punchlist items would meet these requirements. Meeting the capability requirements contained in the J-Standard proved to be a costly proposition for local exchange carriers. As stated in previous comments, USTA estimated that such costs could range from \$2.2 to \$3.1 billion for its members to implement the J-Standard and six punchlist capabilities demanded by law enforcement. These costs have been reduced due to the fact that law enforcement conceded to industry requests to adopt a flexible deployment schedule, whereby carriers, with the concurrence of law enforcement, could seek Commission approval to delay implementation of the capability requirements until the next regularly scheduled switch upgrade. This reduced the overall costs as carriers were no longer required to

make out-of-business cycle software and hardware changes to deploy CALEA capabilities. It also permitted carriers to effectively budget for these costs and to attempt to take steps to minimize the impact on residential ratepayers as required by the statute. Law enforcement was also able to reach agreements with many manufacturers to purchase the switch software necessary to deploy the J-Standard capability. This relieved some of the implementation costs as well. These actions provide carriers and manufacturers with the ability to implement CALEA by cost-effective methods. However, these actions do not defray all of the costs of CALEA and do not ensure that the additional punchlist capabilities can be deployed in a cost-effective manner.

All parties, including the Commission, acknowledge that the cost of the J-Standard capability, the punch list capabilities and the capacity requirements far exceed the \$500 million appropriated by Congress to reimburse carriers for CALEA compliance. 47 U.S.C. § 1009. Residential ratepayers could still be in jeopardy.<sup>8</sup> The ability of carriers to make important investments in the development and deployment of new services is still at risk. The costs of CALEA are solely for the benefit of law enforcement and would not otherwise be incurred by carriers in the provision of telecommunications services to consumers. These costs divert precious resources. This poses a particular hardship for small telephone companies operating in rural areas with severely limited resources.

The record does not support a conclusion that the punchlist capabilities are cost effective. As noted above, the J-Standard provides for alternatives for each of the disputed punchlist capabilities. The J-Standard is the best means for the Commission to ensure that implementation of CALEA capabilities meets the statutory requirement to implement CALEA in a cost effective manner and to minimize costs to residential ratepayers.

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<sup>8</sup> USTA estimates that the costs to meet law enforcement's capacity requirements could range from approximately \$2.35 per line to \$3.66 per line.

Finally, the Court found that the Commission failed to comply with CALEA's requirement that it protect the privacy and security of communications not authorized to be intercepted with respect to post cut through dialed digit extraction. Indeed, many parties apprised the Commission of this problem. It makes no sense for the Commission to require a capability that the surveillance laws do not allow law enforcement to obtain. The Court agreed that Congress did not alter law enforcement's ability to obtain call content. As the Court noted, the Commission was mistaken if it thought that the J-Standard expanded the authority of law enforcement agencies to obtain the contents of communications. "All of CALEA's required capabilities are expressly premised on the condition that any information will be obtained 'pursuant to a court order or other lawful authorization'. 47 U.S.C. § 1002(a)(1)-(3). CALEA authorizes neither the Commission nor the telecommunications industry to modify either the evidentiary standards or procedural safeguards for securing legal authorization to obtain packets from which call content has not been stripped, nor may the Commission require carriers to provide the government with information that is 'not authorized to be intercepted'." *Slip Op.* at 25. The J-Standard provides for law enforcement to receive post cut through dialed digits over the Call Content Channel and the Court confirms that law enforcement may obtain this information with the appropriate authorization. Again, the J-Standard provides the best alternative to provide post cut through digits to law enforcement in a manner that best protects the privacy rights of citizens.

#### **IV. THE COMMISSION MUST SUSPEND THE PUNCHLIST COMPLIANCE DATE.**

Currently before the Commission is a petition to suspend the September 30, 2001 compliance date for implementation of the punchlist and packet mode capability requirements. USTA has already filed in support of that petition. As USTA pointed out, the time has passed


when budgeting decisions should have been made to meet that deadline. Given the uncertainty regarding the outcome of this proceeding to determine whether or not the four punchlist items are required, USTA again urges the Commission to suspend that deadline.

## **V. CONCLUSION**

As has been explained over and over in the record, the J-Standard represents the best means to meet all of the statutory requirements of CALEA and to achieve the careful balance Congress intended. The Commission need only weigh the considerable evidence already before it to reach the conclusion that the four punchlist capabilities are not call identifying information and cannot be required under CALEA.

Respectfully submitted,

**UNITED STATES TELECOM ASSOCIATION**

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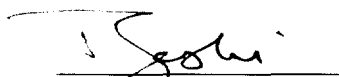
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November 16, 2000

**CERTIFICATE OF SERVICE**

I, Meena Joshi, do certify that on November 16, 2000, Comments Of The United States Telecom Association was either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the attached service list.

  
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